

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VANCE DAVID MURRAY,

Defendant-Appellee.

UNPUBLISHED

June 21, 2007

No. 268836

Oakland Circuit Court

LC No. 2003-189082-FH

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

A jury convicted defendant Vance Murray of possession with intent to deliver 225 or more but less than 650 grams of cocaine.¹ The trial court sentenced Murray to 5 to 60 years in prison. The prosecution appeals this sentence as of right. We vacate and remand for resentencing and correction of the judgment of sentence.

I. Basic Facts And Procedural History

Sergeant Martin Lavin of the Royal Oak Police Department was working undercover with the directed patrol unit in December 2002 when he was introduced to Murray in Royal Oak. Sergeant Lavin accompanied an informant, who purchased an “eight ball,” which is an eighth of an ounce, or three and one half grams, of cocaine, from an associate of Murray. Later in December, Sergeant Lavin purchased one half of one ounce, or 14 grams, of cocaine from Murray. Sergeant Lavin contacted Murray in early January 2003 about purchasing a larger amount, nine ounces, of cocaine to sell at a bar up north. Murray told Sergeant Lavin that nine ounces would cost \$6,250, which Sergeant Lavin believed was the going rate. Sergeant Lavin and Murray exchanged a series of telephone calls to arrange the purchase, which was normal in Sergeant Lavin’s experience. Sergeant Lavin also requested 200 tablets of the drug ecstasy, but

¹ MCL 333.7401(2)(a)(ii). MCL 333.7401(2)(a)(ii) was amended, effective March 1, 2003. The range for the amount of drugs was changed to 450 to 1000 grams. Because Murray was convicted for an offense that occurred on January 9, 2003, the trial court applied the former version of the statute.

Murray was unable to obtain a sufficient quantity. Sergeant Lavin recorded these telephone calls, which he believed numbered about 12, between January 6, 2003, and January 9, 2003.

Sergeant Lavin and Murray eventually agreed to meet at Northland Mall in Southfield. When Murray arrived, he was seated in the driver's seat and was accompanied by two other men, Ladarius Winbush and Randall Keith McDuffy, neither of whom Sergeant Lavin had met before. Sergeant Lavin did not want to get into Murray's vehicle because he had safety concerns. He told Murray he needed to get a scale from his car so that he could weigh the cocaine before he paid Murray. Sergeant Lavin retrieved a scale and was returning to Murray's vehicle when he gave the signal to other officers to approach the vehicle.

The officers arrested Murray, McDuffy, and Winbush and transported them to the Royal Oak Police Department. From the floor of the front passenger area of Murray's vehicle, the police recovered a small bag containing 8.24 grams of cocaine and a large bag from Winbush containing two smaller bags of 120.87 and 123.25 grams of cocaine. No paraphernalia was recovered from the vehicle, Murray, or Winbush. Sergeant Lavin verified that the cellular telephone carried by Murray was the same telephone number he had been calling to arrange the transaction. The police recovered \$2,376 in cash from Murray.

Lieutenant Corgan O'Donohue interviewed Winbush at the police station. Winbush told O'Donohue that he was at Northland Mall to deliver nine ounces of cocaine and that the cocaine belonged to him. Although he initially denied it, Murray eventually admitted that he knew that Winbush had received a large quantity of cocaine from McDuffy and Murray believed they were cutting him out of the deal.

Winbush testified on his own behalf at trial. He said that he was riding around with Murray in Murray's vehicle and shopping for compact discs on January 9, 2003, when they stopped at McDuffy's house. At McDuffy's, Winbush waited in the vehicle and Murray returned with McDuffy, who sat in the front passenger seat. Winbush claimed that, throughout the day, Murray never discussed anything about a cocaine transaction, and Winbush never saw any narcotics. Winbush asserted that McDuffy handed him a tightly wrapped plastic bag to hold and Winbush did not suspect that it was narcotics. Winbush admitted that he smoked some marijuana with McDuffy in the vehicle and put the plastic bag in his pocket. Winbush claimed that he did not realize what was happening and thought they were going shopping at the mall until he was arrested. The jury returned a verdict of not guilty on the charges against Winbush.

McDuffy was charged with possession of less than 25 grams of cocaine, and his case was "resolved." Murray's presentence investigation report indicates that McDuffy pleaded guilty and received two years' probation.

Murray was charged with conspiracy to deliver 225 or more but less than 650 grams of a controlled substance,² possession with intent to deliver 225 or more but less than 650 grams of

² MCL 750.157a; MCL 333.7401(2)(a)(ii).

cocaine,³ and driving with a suspended or revoked driver's license.⁴ Murray moved for a directed verdict with respect to the conspiracy and driving with a suspended or revoked driver's license charges. The trial court granted a directed verdict on the driving with a suspended or revoked driver's license charge but denied Murray's motion regarding the conspiracy charge. The jury found Murray not guilty on the conspiracy charge but convicted Murray for the possession with intent to deliver charge.

At sentencing, the trial court stated that the 20-year mandatory minimum sentence was unfair and excessive. The trial court imposed a downward departure because Murray had limited contact with the actual drugs, and he had enormous family support, as evidenced by the overwhelming letters. The trial court sentenced Murray to 5 to 60 years in prison.

II. Downward Departure

A. Standard Of Review

The prosecution argues that the trial court abused its discretion in departing downward from the statutory minimum sentence. Whether a particular sentencing factor exists is a factual determination for the sentencing court to determine, and we review that determination for clear error.⁵ We review de novo whether a particular sentencing factor is objective and verifiable.⁶ We review for an abuse of discretion whether the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence.⁷ An abuse of discretion occurs when the sentencing court chooses an outcome that falls outside the permissible principled range of outcomes.⁸

B. The Statutory Guidelines

Because defendant was convicted of a crime committed on January 9, 2003, the statutory sentencing guidelines apply.⁹ However, MCL 769.34(2)(a) provides, in pertinent part, "If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section." The former version of MCL 333.7401(2)(a)(ii) provided that any offender "shall be imprisoned for not less than 20 years nor more than 30 years." When the Legislature enacted MCL 333.7401, it hoped to imprison drug dealers for long periods in order to remove them from society and deter others

³ MCL 333.7401(2)(a)(ii).

⁴ MCL 257.904.

⁵ *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995).

⁶ *Id.* at 77-78.

⁷ *Id.* at 78.

⁸ *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

⁹ MCL 769.34(2).

from following their example.¹⁰ The former version of MCL 333.7401(4) stated that a sentencing court could depart from this minimum term of imprisonment if it found on the record that there were substantial and compelling reasons.¹¹ The trial court sentenced defendant to 5 to 60 years in prison, which constitutes a substantial departure from the mandatory 20-year minimum sentence.

Effective March 1, 2003, MCL 333.7401(2)(a)(ii) provides that the statutory maximum sentence is 30 years, and there is no longer a statutory minimum sentence. However, this Court has previously determined that this amendment may not be applied retroactively.¹² Therefore, the trial court was required to apply the former version of MCL 333.7401(2)(a)(ii) and provide substantial and compelling reasons for any departure. A “substantial and compelling reason” must be construed to mean an “objective and verifiable” reason that “keenly” or “irresistibly” grabs our attention, is of “considerable worth” in deciding the length of a sentence, and exists “only in exceptional cases.”¹³

C. Applying The Guidelines

Here, the trial court stated that it was departing from the 20-year mandatory minimum because it was unfair and excessive and because Murray was arrested six weeks before the legislative changes took effect. However, in *People v Michielutti*, the Michigan Supreme Court held that the March 1, 2003 amendments to MCL 333.7401 may not constitute a substantial and compelling reason to depart below the mandatory minimum sentence imposed by the former version of MCL 333.7401.¹⁴ Therefore, we conclude that the trial court erred in relying on these amendments as a reason for departing from the 20-year mandatory minimum sentence.

The trial court also relied on Murray’s limited contact with the actual drugs in imposing a downward departure. When Murray was arrested with McDuffy and Winbush, he did not have any drugs on his person. However, Murray provided transportation and arranged the transaction and was routinely accustomed to arranging large drug transactions. Further, the police recovered 8.24 grams of cocaine from the floor of the front passenger area of Murray’s car and 244.12 grams of cocaine from Winbush, who was seated in the back seat. Therefore, the trial court’s reliance on Murray’s limited contact with the drugs does not keenly or irresistibly grab our attention and does not constitute a substantial and compelling reason for departure.

The trial court cited Murray’s strong family support as a reason for the downward departure. Strong family support may constitute a substantial and compelling reason for a

¹⁰ *Fields, supra* at 67-68.

¹¹ See *People v Claypool*, 470 Mich 715, 719-720; 684 NW2d 278 (2004).

¹² *People v Michielutti*, 266 Mich App 223, 225; 700 NW2d 418 (2005), rev’d in part on other grounds 474 Mich 889 (2005); *People v Thomas*, 260 Mich App 450, 458-459; 678 NW2d 631 (2004).

¹³ *Fields, supra* at 62, 67-68.

¹⁴ *People v Michielutti*, 474 Mich 889; 704 NW2d 705 (2005).

downward departure from a mandatory minimum sentence.¹⁵ The presentence investigation report indicates that Murray told the investigating agent that he was single and had six children with four different women, but only the oldest child lived with him. Murray informed the agent that his parents were deceased and he resided with his aunt, but she did not return the agent's telephone call. We find it more than a little difficult to conceive how family support could be "strong" with four different mothers to Murray's children and an aunt who does not return a telephone call regarding Murray's conviction and incarceration. Further, Murray agreed at sentencing that the presentence investigation report was factually accurate – that is, that he was single and lived with his aunt and only one of his children -- but asserted that his wife and three of his children were present at sentencing. The trial court acknowledged that members of Murray's family had often attended proceedings. Also contrary to the presentence investigation report, Murray claimed that "these kids" lived with him. The trial court stated that it had received a large pile of documents, including letters, on Murray's behalf. Therefore, although there is some evidence of Murray's family support, we conclude that it is not objective and verifiable because Murray gave conflicting information to the agent who conducted the presentence investigation and then agreed that this information was factually accurate. Thus, we conclude the trial court committed clear error in finding that Murray had strong family support.

The trial court stated that the statutory sentencing guidelines range was 51 to 127 months, and imposed a sentence of 5 to 60 years, which was within the guidelines. However, this Court has previously held that it is inappropriate to rely on the recommended minimum sentence under the statutory guidelines as a substantial and compelling reason for departure from a mandatory minimum.¹⁶ Because none of the trial court's reasons for the departure from the mandatory minimum sentence were objective and verifiable, we conclude that the departure constitutes an abuse of discretion. We therefore vacate Murray's sentence and remand for resentencing within the statutory minimum sentence of 20 years and the statutory maximum sentence of 30 years, as dictated by the former version of MCL 333.7401(2)(a)(ii).

D. A Different Judge

The prosecution urges us to remand to a different judge for resentencing. When determining whether resentencing should occur before a different judge, we apply the following test:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and

¹⁵ See, e.g., *People v Harvey*, 203 Mich App 445, 448; 513 NW2d 185 (1994); *People v Shinholster*, 196 Mich App 531, 535; 493 NW2d 502 (1992).

¹⁶ *People v Izarraras-Placante*, 246 Mich App 490, 498-499; 633 NW2d 18 (2001).

duplication out of proportion to any gain in preserving the appearance of fairness.^[17]

After a thorough review of the sentencing transcript, we do not find that the sentencing judge expressed her findings with such certainty and vigor that it would be unreasonable to expect her to put aside her previously expressed views and findings. Reassignment is not necessary to preserve the appearance of justice and could entail waste or duplication that is out of proportion to the gain in preserving the appearance of fairness.

III. Conclusion

Murray's sentence is vacated and we remand for resentencing. The judgment of sentence provides that Murray was convicted of possession with intent to deliver 449 or more but less than 1,000 grams of cocaine.¹⁸ However, the felony information, jury instructions, and jury verdict all provide that Murray was charged with and convicted of possession with intent to deliver 225 or more but less than 650 grams of cocaine under the former version of MCL 333.7401(2)(a)(ii). We therefore also remand for the ministerial purpose of correcting the judgment of sentence to reflect Murray's actual conviction of possession with intent to deliver 225 or more but less than 650 grams of cocaine.¹⁹ We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Kurtis T. Wilder

/s/ Stephen L. Borrello

¹⁷ *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (citations omitted).

¹⁸ MCL 333.7401(2)(a)(ii).

¹⁹ MCR 6.435(A); MCR 7.216(A)(7).